

G. Fairness to All Parties

Under the foregoing approach, the disputing party will have the opportunity to be heard beyond just the comments it files with the non-accredited standards organization. The approach also builds in the opportunity for expert panel review and recommendation as to each technical issue in dispute. Moreover, while the conclusions of such a panel are not binding, funding parties will not be free simply to ignore an alternate dispute resolution result. In fact, we would expect that the report will presumptively resolve the dispute. Only a majority of the funding parties can reject the report, in whole or in part, and we would require the funding parties to articulate reasons why they have done so. At the same time, under this approach the funding parties – and neither one disputant vetoing the wishes of the majority nor the non-accredited standards development organization itself – will remain the ultimate decisionmakers, as we believe they should be.¹⁹

Finally, since the foregoing approach will often involve technical personnel involved in the development of the generic requirements at issue, albeit in a circumscribed role, it will reinforce the principle that the industry should work cooperatively in fashioning technical solutions to technical issues in the first instance, and not resort routinely to the “legalistic” type of presentations on technical matters that the Commission has condemned.²⁰

of the funding parties, since it does not specify that the standards body will actually decide an issue, merely that it can decline to accept the generic requirement and require that the issue be placed on an “open issues” list.

¹⁹ And, if those funding parties that are carriers subject to the Commission’s regulatory jurisdiction act arbitrarily, and such action adversely affects rates or services, the Commission can remedy this using its common carrier regulatory authority over them.

²⁰ Integrated Services Digital Networks, *infra.*, 98 FCC2d at 286.

IV. ADDITIONAL ISSUES

A. Frivolous Disputes

Bellcore believes that the Commission is on the right track in proposing to use the standards of Section 1.52 of the Rules (which is comparable in some respects to Rule 11 of the Federal Rules of Civil Procedures). Rule 11(b)(1) adds additional grounds which might prove useful, *i.e.*, “it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation,” as might subsections (2)-(4) if suitably modified to address these circumstances²¹ However, we fear that such approaches may not prove useful in cases where a sophisticated entity seeks to cause delay, but does so with facially not insubstantial claims. In the absence of a detailed inquiry, such motive may not be uncovered. What will be evident, however, will be the delays and their deleterious effects.

We would recommend against imposition of penalties by the mediation/recommendation panel. Their role is to be a technical one, not a legalistic penalty-imposing one. Penalties should be assessed, if at all, by the Commission. In those cases where the Commission does conclude that a claim was raised frivolously, we would suggest that the penalties it might impose include forfeitures (as proposed by the Commission), requiring the party raising a frivolous claim to bear all costs of the dispute resolution, and compensating the funding parties for the delay. We would

²¹ “(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.”

suggest, however, that the remedy of barring further participation in the generic requirements development process be reserved to address only a pattern of abuse, and not an isolated act.

B. Sunset Provisions

Corning addresses the Section 273(d)(6) sunset provisions in its comments. Bellcore disagrees with Corning's interpretation of the requirements of this provision and, in any event, believes that it is premature for the Commission to address this issue at this time, and in this proceeding. The statute contemplates the filing of an application, and we believe that such an application should be addressed in due course.

V. CONCLUSION

In fashioning the alternate dispute resolution provisions in Section 273(d)(5), Congress sought to provide assurances to funding parties that there will be dispute resolution procedures available to them. These procedures are intended to "enable all interested parties to influence the final resolution of the dispute without significantly impairing the efficiency, timeliness, and technical quality of the activity." For that reason, they have been carefully limited, and we strongly urge the Commission to keep those limitations in mind as it proceeds.

First, only funding parties have statutory standing to utilize the dispute resolution procedures the Commission is to adopt under Section 273(d)(5), and not others who have not, by funding the activity, displayed the requisite interest. Second, the Section 273(d)(5) dispute resolution procedures are available only for technical disputes. Third, the Section 273(d)(5) procedures are to be used only if the funding parties fail to agree to formulate and utilize their

own procedures.²² Fourth, the Section 273(d)(5) procedures were intended to ensure that there would be a forum for resolution of disputes, and not to change the nature or effects of generic requirements and the supplier/purchaser relationships across the telecommunications industry. Fifth, the Commission is not to be a party to any dispute resolution. And finally, dispute resolution is to be completed in the statutory 30 day period.

We also urge the Commission to recognize that funding parties' interests must be protected, and that they need flexibility to make dispute resolution work effectively, without adversely affecting those interests and the interests of the public in service quality and evolution.

Bellcore is proposing a flexible procedure for dispute resolution that, in our view, will achieve the purposes of the new statute in a fair, efficient manner, while not materially disrupting generic requirements development processes that have promoted competition, efficiency and interoperability. Several options would be available, including resolution of the dispute by the funding parties themselves, escalation within the issuing organization possibly coupled with ratification or rejection of the outcome by a majority of the funders, referral to another standards body for its recommendations, or referral in the form of non-binding expert tripartite mediation/recommendation process that is outlined in these comments.

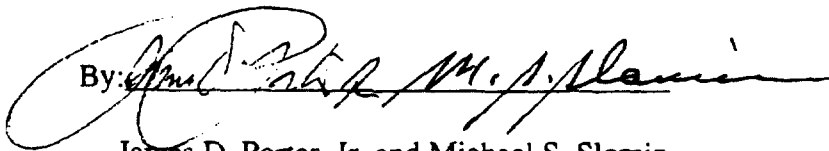
It may be that under the circumstances of a particular dispute a majority of the funding parties will agree that referral to some other organization unrelated to the work effort (*e.g.*, perhaps even Corning's proposal of reference to an accredited "product" standardization organization with largely manufacturer participants, such as a TIA Engineering Committee) will be appropriate, although timeliness alone would seem to make this ordinarily inappropriate.

²² Bellcore believes that such agreement is to be by majority vote.

Bellcore's proposed approach has been crafted to balance a proper role for technically expert personnel in resolving disputes with the need of funding parties to have a say in the dispute resolution procedures that are to apply to work that they are funding at considerable expense, with their need for cost effectiveness, and with the statutory requirement of timeliness. We believe this approach will not create disincentives for entities to provide continuing support not only to Bellcore's generic requirement activities, but also to the efforts of other non-accredited organizations who play vital roles in resolving telecommunications technical issues. We urge the Commission to consider our proposals carefully.

Respectfully submitted,

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APPENDIX

The purpose of this appendix is to provide details on our proposals, in three categories:

- (1) selection options; (2) our proposed default tri-partite mediation/recommendation panel; and
- (3) provisions to apply to all dispute resolution approaches and bodies/panels implementing them.

Selection Options:

- The funding parties may, by majority vote, select a form of alternate dispute mediation and the particular body/panel to implement it from alternatives to be specified by the Commission at the time all funding parties fail to agree with the non-accredited standards development organization to a process under Section 273(d)(4)(A)(v) or they may delay such decisions until such time as a dispute is filed with the non-accredited standards development organization, in which case they will do so within two days. If there is no majority, the default tri-partite mediation/recommendation panel defined below will be employed, or it may be selected by the funding parties as one of the options available to them.
- Form of dispute resolution options will include: (1) resolution of the dispute by the funding parties themselves (with participation, but not voting, by the disputing party and non-accredited standards development organization), (2) escalation within the issuing organization possibly coupled with ratification or rejection of the outcome by a majority of the funders, and (3) referral of the dispute for mediation/recommendation.
- Options on the bodies/panels to which disputes may be referred will include: (1) another standards body, (2) a non-binding expert tripartite mediation/recommendation panel as described below

Default Tri-Partite Mediation/Recommendation Panel:

- The party seeking dispute resolution under Section 273(d)(5) and the non-accredited standards development organization each select an expert mediator within two days of the filing of the dispute with the non-accredited standards development organization, with no restriction on whether he/she participated in the generic requirements development process, and the two expert mediators will select a neutral third panel member acceptable to them within four days of their selection.¹

¹ Even if one or more of the mediators participated previously in the generic requirements development process, their role as mediators will be circumscribed. They will have to articulate their recommendations and rationales, and do so in a tripartite decisional environment in which they must convince the neutral mediator of the validity of their positions.

Procedures for All Mediation/Recommendation, Regardless of the Body or Panel:

- The party seeking dispute resolution will bear all mediation/recommendation costs sustained by the mediators to conduct the mediation, unless the mediators in their decision decide otherwise.²
- The mediators will review, if timely provided, the proposed and final texts of the non-accredited standards development organization and any explanatory material provided to the funding parties, comments and any alternative text filed previously by the funding party seeking dispute resolution, and any statements or comments that the standards development organization and any funding party (including, but not limited to, the party seeking dispute resolution) wish the mediators to consider.
- The mediators will have fifteen days in which to decide the issue or issues raised by the party seeking dispute resolution by majority vote of the mediators, and they will produce a report of their decision to all of the funding parties that reaches a conclusion on each such issue as to whether there is a sound technical basis for the position of the non-accredited standards development organization in its proposed text of the industry-wide standard or industry-wide generic requirement that it proposes to publish in accordance with Section 273(d)(4)(iv).³ A failure to reach a decision on any issue will result in the retention unchanged of the non-accredited standards development organization's language addressing that issue, subject to a vote of the majority of the funders.
- Within the remaining time before expiration of the 30 day period, the funding parties will either accept the results of the mediation, by majority vote, or if they decide to reject it, reject it by majority vote and/or adopt an alternative resolution of the issue. If the funding parties decide not to accept the results of the mediation, and if requested to do so by the party seeking dispute resolution or the non-accredited standards development organization, the funding parties will submit within the remaining time of the thirty day statutory period a statement explaining their decision. Neither the non-

² While we are proposing non-binding mediation, it may be appropriate to require the disputing party and the non-accredited standards development organization to agree in writing at the outset to be bound by an award that the mediators might make of the costs sustained by the mediators to conduct the mediation. This would be the sole exception to the otherwise non-binding nature of the mediators' decision.

³ This approach requires a decision on each issue in dispute, and therefore is consistent with the statutory plan that dispute resolution not introduce delay in the generic requirements process and that decisions resolving the dispute be promptly reached. In contrast, Corning appears to be advocating an approach under which issues will remain open even after its proposed dispute resolution process. See Corning comments, n.10 *op cit.*, Attachment A, Section 4.2.2.

accredited standards development organization nor the disputing party will participate in the foregoing majority voting.⁴

⁴ The funding parties will be free to decide whether a committee or subcommittee of the parties, or whether the non-accredited standards development organization, is to prepare such a report.

CERTIFICATE OF SERVICE

I, Cynthia Jackson, certify that this first day of April, 1996, I mailed, First Class mail postage prepaid, copies of the foregoing "Comments of Bell Communications Research, Inc. in Response to Notice of Proposed Rulemaking" in GC Docket No. 96-42 to the following:

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